In the High Court of Judicature at Madras

Dated 26.04.2007

Coram

The Honourable Mr.Justice S.R.SINGHARAVELU

Appeal Suit No.258 of 2000

N.Ramachandran ..Appellant/Defendant

..vs..

M.Nayanamalai ..Respondent/Plaintiff

Appeal Suit filed against the judgment and decree dated 23.03.2000 made in O.S.No.57 of 1997 on the file of Principal Subordinate Judge, Salem.

For Appellant : Mr.M.V.Chandran

For Respondent : Mr.V.Srinivasan

JUDGMENT

Defendant is the appellant. This Appeal arises against the judgment and decree of learned Principal Subordinate Judge, Salem, in O.S.No.57 of 1997 (dated 23.03.2000) in decreeing the suit filed for specific performance.

2. The subject matter of the suit is a site of an extent of 4275 sq.ft.with a building thereon situate in Survey No.98, Plot No.94 in Swarnapuri Colony of Alagapuram Village, Salem District.

3. According to Ex.A-2, a settlement deed dated 06.08.1986 executed in favour of the appellant/ defendant by one Angu Rathnam Chettiar, the said property will devolve upon the appellant/defendant and in case, male children are born to him, it will devolve upon them after the lifetime of the appellant. So, what right the appellant/defendant had in the property was only a life interest, as he got two sons.

4. It is not in dispute that the settlement deed was produced at the time when there was a bilateral agreement for sale of the property under Ex.A-1 dated 02.02.1994; which is why

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originally the agreement contained a clause that the defendant shall execute the sale deed along with his legal heirs. Of course, as it stands now the agreement contains no such recitals and they were found scored. The further recitals of the said Ex.A-1 agreement indicates that there was passing of advance of amount of Rs.51,000/- on that date; that the toal consideration was fixed at Rs.8,10,000/-; that a sum of Rs.2 lakhs out of the sale consideration should be paid on or before 05.03.1994; that within a period of seven months from the date of the agreement, the balance sale consideration should be paid; and on such payment, the appellant / defendant should execute the sale deed. The recitals further contained that if the plaintiff fails to perform his part of the contract, the agreement will get frustrated and he will be liable for the forfeiture of the advance amount paid; and if default was committed on the part of the appellant/defendant in executing the sale deed with free encumbrance and along with I.T.C.Certificate and possession, it is for the plaintiff to deposit the balance sale consideration into the Court and sue for specific performance with costs and damages.

5. The respondent/plaintiff did not make payment of Rs.2 lakhs on 05.03.1994 as agreed under Ex.A-1. So on 12.07.1994 under Ex.A-5, the defendant issued a notice to the plaintiff indicating the default committed by the latter in not making payment of Rs.2 lakhs as agreed under EX.A-1 within the date mentioned thereto, namely, 05.03.1994 and granting further time till 02.09.1994 to pay the entire balance of sale consideration of Rs.7,59,000/- excluding the advance paid Rs.51,000/-. The following are the words found in Ex.A-5 notice of appellant/defendant;

> "Though you have failed to honour this solemn agreement to pay Rs.2 lakhs on 05.03.1994, however, our client out of good gesture, hereby gives you time till 02.09.1994 to pay the entire balance of sale consideration namely Rs.7,59,000/- and the said time shall be the essence of the contract. If you fail to complete the sale on or before 02.09.1994 the said agreement shall stand cancelled and the advance of Rs.51,000/- paid by you will be forfeited and also you are liable to pay Rs.500/- towards cost of this notice".

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6. Now, the dispute starts from the plaintiff by his issuance of a reply dated 20.07.1994 under Ex.A-3, wherein it was mentioned as follows:

> "....by virtue of a (Gift) Settlement deed executed by A.Angu Rathnam Chettiar dated 06.08.1986, whereby your client has been given only limited interest in the concerned property and after your client's death, his two sons, who are adult sons now, should get the

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property.....My client insisted that your client's two adult sons should also join in the execution of the sale deed, as otherwise such sale to be executed by your client will not be valid. Your client agreed to get the execution of the sale deed not only by your client but also by your client's two adult sons....".

It was further mentioned as if on 05.03.1994, when a sum of Rs.2 lakhs was tendered by respondent/plaintiff, as the appellant/defendant could not procure his sons for getting the document executed, postponed the matter and therefore, no amount of Rs.2 lakhs was paid in time. According to plaintiff, since he tendered the amount, there was no failure of performance of his part of the contract. Even in another notice of plaintiff under Ex.B-1 dated 02.09.1994, he has expressed his readiness to pay in the event of the sons of defendant joining with later in executing the sale deed to plaintiff.

7. So far as the contention made in respondent/ plaintiff's notice Ex.A-3 dated 20.07.1994 as if appellant had agreed on 05.03.1994 that along with his two sons he will execute the sale deed, such statement of plaintiff was given a go-by in the course of evidence of P.W.1, who deposed that on 05.03.1994 when he tendered Rs.2 lakhs and asked to make his two sons to join in execution of the sale deed, the appellant replied that even if there are two sons, he alone could execute the document. According to P.W.1, unless sons of defendant do join in sale deed, no amount could be paid. It is also admitted by P.W.1 that during the time of executing the agreement under Ex.A-1, he has seen Ex.A-2 (settlement deed) and knew that this property was acquired by the appellant only under that settlement deed. P.W.1 further added that at that time the appellant told him that there was no sons for him; and so, believing upon his version, plaintiff had entered into that agreement. As mentioned earlier, the agreement as it stands does not contain the clause that the sale deed should be executed along with the legal heirs. It was once written and subsequently scored. Perhaps, as deposed by P.W.1, he was made to believe by the appellant that there was no sons and therefore, the said words were scored in Ex.A-1.

8. P.W.1 in the course of his evidence had deposed as follows:

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"எதிர் வாதிக் கு 2 பையன் கள் இருப் பதாக தெரியவந் தது. ஒப் பந் தத் தில் குறிப் பிட் டுள் ளபடி நான் ரூ 2 லட் சம் தொகையை எடுத் துக் கொண் டு எதிர் வாதியை போய் பார் த் தேன் .....எதிர் வாதி பையன் கள் இருந் தாலும் தான் தான் கையெழுத் து போடுவேன் என் றும் நீங் கள் பணத் தைக் கொடுங் கள் என் றும் கேட் டார் ".

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D.W.1 also affirmed the suggestion made to him while he was cross examined:

> "என்னுடைய மாமா செட்டில்மெண்ட் செய்து கொடுத்த காலத்தில் எனக்கு 2 பையன்கள் பிறந்திருந்தனர்.... என்னுடைய பையன்களை சேர்த்து கிரயம் செய்து கொடுக்க மாட்டேன் என்று நான் கூறிவிட்டேன் என்றால் சரிதான்.... ரூ 12 லட்சம் பெறக்கூடிய சொத்தை ரூ 8 லட்சத்திற்கு கொடுக்கிறேன் என்றால் அதில் வில்லங்கம் இருக்கிறது என்பதை தெரிந்து கொள்ளுங்கள் என்றும் வில்லங்கத்தை நீங்களே தீர்த்துக் கொள்ளுங்கள் என்றும் நான் வாதியிடம் சொன்னேன்....."

This is against the contents of the notice of the plaintiff, wherein it is mentioned as if defendant agreed to get the document executed also by his two sons. Therefore, it is made clear that the defendant never agreed to get the document executed also by his two sons. But it is the consistent claim of the plaintiff to do so. This is where the controversy arose and that is why the plaintiff could not make the payment in time as the appellant never agreed to get the document executed also by his two sons; and as the agreement Ex.A-1 does not warrant the defendant to do so; the appellant/defendant is only obliged to execute the sale deed in respect of whatever interest that he had in the suit property. Of course under Ex.A-2, he is having only possessory right and life interest. Now, the question would arise as to whether a sale deed could be executed in respect of the possessory right or the life interest of the appellant.

9. I have gone through the SALMOND ON JURISPRUDENCE, TWELTH EDITION by P.J.FITZGERALD, 1966, wherein at page 47, I find the following:

> "For example: a landowner wishing to provide for his sons, A and B, may constitute them co-owners of it. Alternatively he might divide the land into two parts, giving one part to each as sole owner. A third method would be to convey the land to A for life and thereafter to B in fee simple. In this case neither son becomes sole owner of the land; nor would they be co-owners. Each is sole owner of a separate estate or interest in the land. A has a life estate, which is vested in possession; B has a fee simple remainder vested, not in possession, but in interest".

Even at end of page 49, the following is found:

> "Thus on a devise to A for life with remainder to B in fee simple, B's interest is vested because there is nothing but A's prior interest to stand between him and the actual enjoyment of the land. In technical language, B's interest

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is vested in interest, though not vested in possession; it becomes vested in possession only on the death of A.

An estate may be vested in interest although the facts may be such that it never becomes vested in possession, and so never gives a right to the actual enjoyment of the land. Thus on a devise to A for life with remainder to B for life with remainder to C in fee simple, B's estate is vested in interest notwithstanding that if B dies before A his interest will never vest in possession. For there is still nothing but A's estate between B and the enjoyment of the land".

10. It also describes about vesting and contingent ownership and it starts by stating that,

"Ownership is either vested or contingent. It is vested when the owner's title is already perfect; it is contingent when his title is as yet imperfect, but is capable of becoming perfect on the fulfilment of some condition. In the former case, the ownership is absolute; in the latter it is merely conditional. In the former case the investitive fact from which he derives the right is complete in all its parts; in the latter it is incomplete, by reason of the absence of some necessary element, which is nevertheless capable of being supplied in the future. In the meantime, therefore, his ownership is contingent, and it will not become vested until the necessary condition is fulfilled. A testator, for example, may leave property to his wife for her life and on her death to A, if he is then alive, but if A is then dead, to B. A and B are both owners of the property in question, but their ownership is merely contingent. That of A is conditional on his surviving the testator's widow; while that of B is conditional on the death of A in the widow's lifetime".

11. Here also, the appellant/defendant was having an ownership of a particular right;

12. I have gone through the Transfer of Property Act by MULLA TENTH EDITION, wherein while dealing with the distinction between tangible and intangible immovable property, the contrast is between the estate of one who is possessed of the land, the tangible thing, and that of a man who has the mere right, the intangible thing, without possession of anything tangible. It was stated that a patta right is intangible property and the sale of such a right must be effected by a registered instrument (Anthya . vs.. Gattadw (AIR 1950 Hyderabad 38).

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13. Even according to Section 3(26) of the General Clauses Act, if any property is regarded as tangible immovable one, the same must be under Section 54 by a registered instrument, if the value exceeds Rs.100. So, the wider meaning of ownership as found under Section 54, which defines as the sale under Transfer of Property Act, there can be a sale of tangible immovable property and the interest thereon. If such a wider meaning is given, then the right of possession till the lifetime of the life estate owner (even though it is lacking the capacity to disopose the property either testamentary or intestate) contains a saleable interest which have the wider meaning of ownership as contempleted under Section 54.

14. Why it is chosen to see seriously as to whether the life estate owner can make sale under Section 54 of Transfer of Property Act about the interest that he is in the property throughout his lifetime is that in case if it becomes not an ownership as contempleted under Section 54 of the Act, then there cannot be a direction to the defendant to make sale of the same in pursuance of any bilateral agreement, as the same is hit under law. So much was said in M/s.Bharat B & D Mfg.Co.Pvt.Ltd., .vs. Hindustan Petroleum Corporation Ltd., (AIR 1989 Bombay 170 at page 177 that if the agreement was contrary to law, the consequence of enforcement of the contract would be only to enforce an illegality and an infraction of a statutory provision which could not be condoned by any conduct or agreement of the parties.

15. In Smt.Surasaibalini Debi .vs. Bhanindra Mohan Majumdar (AIR 1965 SC 1364), the Court noted that in the case on hand there was a clear admission by the respondent of the facts on which illegality was sought to be made out. The Court approved the observations of Lindley, L.J.in Scott .vs. Brown (1892) 2 QB 724, that if the facts given in evidence clearly disclosed an illegality the Court was bound to take notice of this fact even if it was not pleaded by the defendants. In Abdula Saheb .vs. Guruvappa and Co., AIR 1944 Mad 387, a learned single Judge quoted Lord Mansfield and Scrutton,L.J., in passages that indicate the rationale of not enforcing an agreement which is unlawful. Lord Mansfield was quoted in a latter judgment, (1940) 2 KB 590 as having said:-

> "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objectio is over allowed; but it is founded on general principles of policy, which the defendant has the advantage of contrary to the real

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justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act".

16. In Sankaran,S.and others .vs. N.G.Radhakrishnan (1994-2-L.W.642), it was observed that "there is no justification for granting relief of specific performance, especially when the plaintiff has come forward with false claim. Utmost good faith and honesty is expected from the parties, who want the discretion of court to be exercised in his favour. The court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter the judicial verdict. The court is bound to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff". In this connection, reliance was placed upon Krishnan Nair and others ..vs.. V.K.Parameswaran Pillai and others (1993(2) L.W.411) and Nallava Gounder and another .vs. P.Ramaswami Gounder and others (1993-2-L.W.86).

17. In Samrathmal Jain (deceased) rep.and others .vs. Nainshukdas Baldeodas and others (2005(3) TLNJ 405), reliance was placed upon Rickmers Verwaltung GMBH .vs. Indian Oil Corporation Ltd., (1999(1) SCC 1, in which the following was observed:

"In this connection, the cardinal principle to remember is that it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence,.....The court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement upon all material terms then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence".

18. Similarly, the Supreme Court in its decision reported in Mayawanti .vs. Kaushalya Devi (1990(3) SCC 1) observed as follows:

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"Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or enforceable. The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract".

19. In I.T.C.Ltd. .vs. G.J.Fernandes (AIR 1989 SC 839), it was held that where the parties make mutual mistake in understanding each other and are at cross purposes, there is no real correspondence of offer and acceptance, there is no consensus ad idem existing. It was further held that there is no agreement at all; and the contract is also void".

20. As we now found that life estate was also an ownership of right while absolute estate is bundle of rights of ownership, it may not be said that the agreement is illegal in so far as it is concerned about the interest of the life estate, which indicates a particular right in such bundle of rights; and that right is the right to possess during the life of the life estate interest holder. So there is no illegality in enforcing the agreement of sale of right of life interest.

21. The next question that would arise is whether time is essence of the contract. In this connection, the plaintiff relied upon Satyanarayana .vs. Yelloji Rao (AIR 1965 SC 1405), wherein it was observed that "in England the relief of specific performance pertains to the domain of equity; in India, to that of statutory law. In England there is no period of limitation for instituting a suit for the said relief and therefore, mere delay the time lag depending upon circumstances may itself be sufficient to refuse the relief; but, in India mere delay cannot be a ground for refusing the said relief, for the statute prescribes the period of limitation".

22. By relying upon HALSBURI's LAWS OF ENGLAND, Vol.36 at p.324 and in Fry on Specific Performance, 6th Ed.at p.517 and (1857) 114 RR 336 and (1854) 43 ER 671 and (1868) 3 Ch A 496 and (1830) 39 ER 91 and (1878) 3 AQC 1218, held not applicable in India, it was held in that case that doctrine of laches may have some bearing in the Indian context but neither the delay nor the allegation that the time was essence of the contract may not non-suit the plaintiff; provided if the suit is filed in time, as prescribed in the Statute, which is Article 113 of the Limitation Act; which prescribes three years period of limitation from the date fixed for the performance or if no such date is fixed, when the plaintiff has notice that performance is refused.

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23. After stating the English and Indian case laws, it was observed in the above cited case law (AIR 1965 SC 1405) that time is not the essence of the contract; mere delay without such conduct on the part of the plaintiff as would cause prejudice to the defendant does not empower a Court to refuse the relief of specific performance. The next aspect is about the readiness and willingness of plaintiff to perform his part of the obligation.

24. True it is, that in this case as per the Agreement, an amount of Rs.2,00,000/- was not paid by plaintiff but the defendant has extended the time and proved it in his notice dated 12.07.1994, wherein time was extended till 02.09.1994 for the balance of sale consideration of Rs.7,59,000/-. Thereafter, the plaintiff would say that he was very much ready and willing to pay the same and he has got the means to make payment. In the course of his evidence, it was deposed as if he has got several shops at Salem and that there is permanent income from thereon. Excepting by saying that there was no capacity for the plaintiff to make payment in the written statement, the defendant did not say anything against the plaintiff. In this connection also, in order to assess whether a particular party was ready and willing to perform his part of the contract, there are catena of case laws.

25. In Bharat B & D.Mfg.Co.Pvt.Ltd .vs. H.P.Corporation Ltd., (AIR 1989 Bombay 170), reliance was placed upon a case law in Md.Ziaul Haque .vs. Calcutta Vyaper Pratisthan (AIR 1966 Calcutta 605), wherein it was observed as follows:

> "Readiness and willingness to perform the agreement must be readiness and willingness to perform not as the plaintiff wished it nor in the way that the plaintiff evidenced it prior to the instituting of the suit, nor in the way the plaintiff wanted to fashion it at the trial but whether the plaintiff was really ready and willing to perform the real agreement between the parties. The words "real agreement" would mean either the agreement that the plaintiff and the defendant had between the parties or it would mean the real agreement which the Court finds it to be real agreement. The question of readiness and willingness however would assume different aspects in relation to the real agreement. If at the trial it transpires that the real agreement is not what the plaintiff alleges and the readiness and willingness which the plaintiff displayed was in relation to a different agreement, the plaintiff would be within the mischief of the doctrine of readiness and willingness.....".

26. On the same subject, it was held in Rahat Jan .vs. Hafiz Mohammad Usman (AIR 1983 Allahabad 343) that the plaintiff

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is duty bound to aver and prove his readiness and willingness to perform contract according to real agreement. He cannot add any additional condition for performance of his part of contract.

27. By relying upon this, it is argued on the side of the appellant/defendant that the plaintiff cannot add one more condition that the defendant is to execute the sale deed by impleading his two sons, which is not found in the real agreement. Of course, it was originally written in the agreement, but later on it was scored and regarding that there is no dispute. It is not alleged by the plaintiff that even against his wishes, it was clandestinely modified or removed. As mentioned earlier, the plaintiff believed the version of the defendant that his two sons may not join to execute the sale deed and therefore, perhaps without any caution, agreed to omit those words, which were once available in the agreement.

28. Having so agreed to get sale deed executed only from the defendant, and having allowed to score the words in the agreement to the effect that defendant's two sons also shall be impleaded as vendors, then it is for plaintiff to get sale deed from the defendant of whatever saleable interest that he had in suit property for which plaintiff need not show the cash or count down it before the Court or to deposit the same. Enough it is that plaintiff was ready and willing to pay the same during the execution of the sale deed and registration thereof before the concerned authority; for which according to plaintiff, he is ready.

For reasons stated above, the plaintiff is entitled to get the sale deed executed from the defendant only in respect of the latter's life interest in suit property upon payment of balance of sale consideration to defendant by plaintiff before the Sub-Registrar concerned, during the time of such execution of sale deed by defendant. After the life time of the vendor, his sons will take delivery of possession from respondent/plaintiff by due process of law. The appeal is allowed only to that extent, by setting aside the decree and judgment of the trial court. No costs throughout.

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To

1. The Principal Subordinate Judge,
Salem.

2. The Record Keeper,
VR Section, High Court, Madras.

+ 1 cc to M/s. V. Srinivasan, Advocate SR No. 28709

+ 1 cc to Mr. M. V. Chandran, Advocate SR no. 28352

SSL(CO)
SR/4.6.2007 Judgment in Appeal Suit No.258 of 2000

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